The Use of Federal Troops for Disaster Assistance: Legal Issues

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Summary

Natural disasters, such as Hurricane Katrina, raise questions concerning the President's legal authority to send active duty military forces into a disaster area and the permissible functions the military can perform to protect life and property and maintain order. The Stafford Act authorizes the use of the military for disaster relief operations at the request of the state governor, but it does not authorize the use of the military to perform law enforcement functions, which is ordinarily prohibited by the Posse Comitatus Act. However, the President may invoke other authorities to use federal troops to aid in the execution of the law, including the Insurrection Act. This report summarizes the possible constitutional and statutory authorities and constraints relevant to the use of armed forces, including National Guard units in federal service, to provide assistance to states when a natural disaster impedes the operation of state and local police.

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Recognizing the risk that a standing army could pose to individual civil liberties and the sovereignty retained by the several states, but also cognizant of the need to provide for the defense of the nation against foreign and domestic threats, the framers of the Constitution incorporated a system of checks and balances to divide the control of the military between the President and Congress and to share the control of the militia with the states. This report summarizes the constitutional and statutory authorities and limitations relevant to the employment of the armed forces to provide disaster relief and law enforcement assistance.

Congress has the constitutional power to raise, support, organize and regulate the armed forces, art. I, § 8, cls. 11-14. These clauses do not expressly limit Congress as to how, when, or where it might employ the armed forces, although presumably such use must be in furtherance of other constitutional powers. Congress is also empowered to provide for calling forth the militia to execute federal law and to suppress insurrections, § 8, cl. 15, and to provide for organizing, arming, and disciplining the militia and to govern them when they are employed in the service of the United States, § 8, cl. 16. Once the army is raised or the militia called forth, the President serves as their Commander-in-Chief, art. II, § 2, cl. 1. And of course, the President is vested with the responsibility to "take Care that the Laws be faithfully executed," art. II, § 2, cl. 3. Congress has delegated to the President the authority to use the armed forces to respond to a variety of domestic crises, and Presidents have asserted some inherent authority to use the military even without express statutory authorization.

Under the Constitution, states retain the primary responsibility and authority to provide for civil order and the protection of their citizens' lives and property. However, the Constitution provides that the federal government is responsible for protecting the states against invasion and insurrection, and, if the state legislature (or the governor, if the legislature cannot be convened) requests it, protection against "domestic Violence," art. IV, § 4. States may not keep their own standing armies, art. I, § 10, cl. 3, but they retain the authority to call forth their militias to suppress insurrections or quell civil disturbances, subject to any restraints imposed by the Constitution or by Congress, in the exercise of its constitutional powers. Congress has complete authority over federal lands, military installations, and similar areas, art. I, § 8, cl. 17.

The Posse Comitatus Act

The Constitution does not explicitly bar the use of military forces in civilian situations or in matters of law enforcement, but the United States has traditionally refrained from employing troops to enforce the law except in cases of necessity. The Posse Comitatus Act (PCA), 18 U.S.C. § 1385, punishes those who, "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully use[] any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws.... "[1] The Act does not apply to the Navy or Marines[2] and does not prohibit activities conducted for a military purpose (base security or enforcement of military discipline) that incidentally benefit civilian law enforcement bodies. The Act does not apply to the National Guard unless it is employed in federal service. Questions arise most often in the context of assistance to civilian police. At least in this context, the courts have

[1] See CRS Report 95-964, *The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law*, by Charles Doyle.

[2] Department of Defense regulations effectively place them under similar constraints, and the limitations on assistance to civilian law enforcement authorities apply to them, 10 U.S.C. § 375.

held that, absent a recognized exception, the PCA is violated (1) when civilian law enforcement officials make "direct active use" of military investigators, (2) when the use of the military "pervades the activities" of the civilian officials, or (3) when the military is used so as to subject citizens to the exercise of military power that is "regulatory, prescriptive, or compulsory in nature."

Statutory Exceptions

Congress has provided for a number of statutory exceptions to the PCA by explicitly vesting law enforcement authority either directly in a military branch (e.g, the Coast Guard) or indirectly by authorizing the President or another government agency to call for assistance in enforcing certain laws.[3]

Enforcement of the Laws to Restore Public Order (the Insurrection Act)

Congress has delegated authority to the President to call forth the military during an insurrection or civil disturbance, 10 U.S.C. §§ 331-335.[4] Section 331 authorizes the President to use the military to suppress an insurrection at the request of a state government, which is meant to fulfill the federal government's responsibility to protect states against "domestic violence" (although the term "insurrection" is arguably much narrower than the phrase "domestic violence"). Section 332 delegates Congress's power under the Constitution, art. I, § 8, cl. 14, to the President, authorizing him to determine that "unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States make it impracticable to enforce the laws of the United States" and to use the armed forces as he considers necessary to enforce the law or to suppress the rebellion. Section 333 permits the President to use the armed forces to suppress any "insurrection, domestic violence, unlawful combination, or conspiracy" if law enforcement is hindered within a state, and local law enforcement is unable to protect individuals, or if the unlawful action "obstructs the execution of the laws of the United States or impedes the course of justice under those laws." This section was enacted to implement the Fourteenth Amendment and does not require the request or even the permission of the governor of the affected state.

The Insurrection Act has been used been used to send the armed forces to quell civil disturbances a number of times during U.S. history, most recently during the 1992 Los Angeles riots and during Hurricane Hugo in 1989, during which widespread looting was reported in St. Croix, Virgin Islands. If the President decides to respond to such a situation, generally upon the

[3] For a list of these authorities, see CRS Report 95-964, *The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law*, at ns. 63-64.

[4] In 2007, the 109th Congress amended 10 U.S.C. § 333 to authorize the President to employ federal troops to "restore public order and enforce the laws of the United States," without a request from the governor or legislature of the state involved, in the event that he determined that local authorities were unable to maintain public order. The expanded authority was contingent on the enjoyment of equal protection of the laws being impeded or on the obstruction of the execution of federal law and related judicial process (P.L. 109-364, 120 Stat. 2404, (October 17, 2006)). During the 110th Congress, Senator Patrick Leahy stated, while introducing S. 513 as an attempt to repeal the expanded authority, that it had been added at the request of the Administration as a rider to the FY2007 Defense Authorization and that it was "made without consulting the other relevant policy committees in the Senate and the House." (Cong. Rec. S1712 (daily ed. February 7, 2007). Language was subsequently added to the FY2008 Defense Authorization bill repealing the expanded authority (P.L. 110-181, 122 Stat. 325 (January 28, 2008)); returning the Insurrection Act to what had been in effect prior to the FY2007 Defense Authorization bill and returning the authority to utilize the National Guard, during domestic emergencies, to the state governors.

recommendation of the Attorney General and, if necessary, the request of the governor, he must first issue a proclamation ordering the insurgents to disperse within a limited time, 10 U.S.C. § 334.[5] If the situation does not resolve itself, the President may issue an executive order to send in troops.[6]

Military Support for Law Enforcement Agencies

Congress has also authorized the armed forces to share information and equipment with civilian law enforcement agencies, 10 U.S.C. §§ 371-382, although prohibiting the use of armed forces personnel to make arrests or conduct searches and seizures.

Inherent Emergency Power

Department of Defense (DOD) regulations assert another exception that does not rest on statutory authority, but is available in very limited circumstances and covers

> Actions that are taken under the inherent right of the U.S. Government ... to ensure the preservation of public order and to carry out governmental operations within its territorial limits, or otherwise in accordance with applicable law, by force, if necessary.[7]

The emergency power, according to DOD directives, is available to protect federal property and functions, and to authorize

> prompt and vigorous Federal action, including use of military forces, to prevent loss of life or wanton destruction of property and to restore governmental functioning and public order when sudden and unexpected civil disturbances, disaster, or calamities seriously endanger life and property and disrupt normal governmental functions to such an extent that duly constituted local authorities are unable to control the situation.[8]

Ordinarily, the implementation of such operations must be authorized by executive order, but DOD officials and military commanders may take emergency action without prior authorization in cases where

> sudden and unexpected civil disturbances (including civil disturbances incident to earthquake, fire, flood, or other such calamity endangering life) occur, if duly constituted local authorities are unable to control the situation and circumstances preclude obtaining prior authorization by the President.[9]

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[5] *See, e.g.*, Proclamation No. 6427, 57 Fed. Reg. 19,359 (May 1, 1992) (citing California governor's notification and request related to rioting in Los Angeles, and also determining that the "domestic violence and disorder are also obstructing the execution of the laws of the United States"); Proclamation No. 6023, 54 Fed. Reg. 39,151 (September 20, 1989)(Virgin Islands).

[6] *See, e.g.*, Exec. Order No. 12804, 57 Fed. Reg. 19361 (May 1, 1992); Exec. Order No. 12690, 54 Fed. Reg. 39153 (September 20, 1989).

[7] DOD Cooperation with Civilian Law Enforcement Officials, DOD Dir. 5525.5 (Encl. 4) § E4.1.2.3 (1989).

[8] *Id*.

[9] Military Assistance for Civil Disturbances, DOD Dir. 3025.12 § 4.2.2. (1994).

The Stafford Act

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act, 42 U.S.C. §§ 5121, et seq.) authorizes the President to make a wide range of federal aid available to states that are stricken by a natural or man-made disaster.[10] It provides statutory authority for employing the U.S. armed forces for domestic disaster relief. Permitted operations include debris removal and road clearance, search and rescue, emergency medical care and shelter, provision of food, water, and other essential needs, dissemination of public information and assistance regarding health and safety measures, and the provision of technical advice to state and local governments on disaster management and control. The authority does not constitute an exception to the PCA. In the event of a disaster that results in the wide-scale deterioration of civil law and order, the authority to employ active duty troops to perform law enforcement functions must be found elsewhere. The Stafford Act does not authorize the use of federal military forces to maintain law and order. Federal forces would have no authority, for example, to act as traffic controllers or provide security for facilities used in the relief efforts, unless such activities serve a valid military purpose. Patrolling in civilian neighborhoods for the purpose of providing security from looting and other activities, would not be permissible, although patrolling for humanitarian relief missions, such as rescue operations and food delivery (which may have the incidental benefit of deterring crime) would not violate the PCA. Military resources may be employed in the following situations.

Essential Assistance (10-Day Authority)

Upon the request of the governor, the President may task the Department of Defense to provide any emergency work the President deems essential for the preservation of life and property in the immediate aftermath of an incident that may ultimately qualify for assistance under a declaration. Such assistance is available for up to ten days prior to a presidential declaration of an emergency or a major disaster, 42 U.S.C. § 5170b(c). Emergency work can include the clearance and removal of debris and wreckage and the restoration of essential public facilities and services, 42 U.S.C. § 5170(c)(6)(B). The provision is designed for instances where communications problems impede the ability to meet the prerequisites for declaring an emergency or major disaster or the ability to coordinate the work through FEMA.

Emergency

Unless the President determines that a disaster implicates preeminently federal interests, the declaration of an emergency under the Stafford Act requires that the governor of the affected state first make a determination that the situation is of such severity and magnitude that the state is unable to respond effectively without federal assistance, which determination must include a detailed definition of the type and amount of federal aid required, 42 U.S.C. § 5191. The governor must also implement the state's emergency response plan, for example, by activating the state's National Guard units under state control (in which case the PCA does not apply to them), and provide information regarding the resources that have been committed.

[10] For an overview of the Stafford Act, see CRS Report RL33053, *Federal Stafford Act Disaster Assistance: Presidential Declarations, Eligible Activities, and Funding*, by Keith Bea.

Major Disaster

The prerequisites for a major disaster declaration are similar to those for an emergency, 42 U.S.C. § 5170. The governor must first execute the state's emergency plan and make a determination that state capabilities are insufficient to deal with the circumstances. However, the governor need not specify which forms of assistance are needed. The governor must provide information regarding the resources that have been committed and certify that the state will comply with cost sharing provisions under the Stafford Act. There is no provision for the declaration of a major disaster without the governor's request. If the governor activates Guard units and keeps them under state control, those units are not restricted by the PCA. If the state's National Guard units are called into federal service to respond to an emergency or a major disaster, their role is restricted to the disaster relief operations authorized under the Stafford Act.

Immediate Response Authority

DOD doctrine allows commanders to provide resources and assistance to civil authorities without or prior to a declaration under the Stafford Act when a disaster overwhelms the capabilities of local authorities and necessitates immediate action "to prevent human suffering, save lives, or mitigate great property damage."[11] Immediate response actions can include the types of activities authorized under the Stafford Act, including, at the request of civil authorities, rescue, evacuation, and emergency medical treatment, restoration of essential public services, debris removal, controlling contaminated areas, safeguarding and distributing food and essential supplies, and supplying interim emergency communications.[12] The immediate response authority may also include law enforcement activities ordinarily prohibited by the PCA. The controlling directive does not require a request from state or local officials, but states that

> DoD Components shall not perform any function of civil government unless absolutely necessary on a temporary basis under conditions of Immediate Response. Any commander who is directed, or undertakes, to perform such functions shall facilitate the reestablishment of civil responsibility at the earliest time possible.[13]

The immediate response authority is not provided for in any statute, but is said to have deep historical roots.[14] The 1906 San Francisco earthquake is a noted example. The commanding general of the Pacific Division, on his own initiative, deployed troops to assist civil authorities to stop looting, protect federal buildings, and to assist firefighters.[15]

[11] U.S. Dep't of Defense, Military Support to Civil Authorities, DOD Dir. 3025.1 § 4.5 (1993).

[12] *Id.* § 4.5.1.

[13] *Id.* § 4.4.10.

[14] *See* Jim Winthorp, *The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MAC)*, ARMY LAW. 3 (July, 1997).

[15] *Id.* at 5.

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